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No. 82-1047

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below properly held that a statutory forfeiture proceeding, filed by the United States and based on a claimed violation of the federal criminal statute pertaining to unlicensed dealing in firearms, is barred by an earlier acquittal establishing that there was in fact no such violation.

2. Whether the court below properly held that the forfeiture action, based upon the identical acts as the criminal case, is also barred by the doctrine of collateral estoppel and by the double jeopardy clause of the fifth amendment to the United States Constitution.

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OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. B. 15a-29a) is reported at 669 F.2d 206. The *en banc* opinion of the court of appeals (Pet. App. A. 1a-14a) is reported at 685 F.2d 913. The district court opinions (Pet. App. E. 45a-55a; Pet. App. D. 31a-44a) are reported at 463 F. Supp. 365 and 511 F. Supp. 133.

JURISDICTION

The judgment of the court of appeals (Pet. App. C. 30a) was entered on August 23, 1982. On November 12, 1982 the Chief Justice extended the time in which to file a petition for writ of certiorari to and including December 21, 1982 and the petition was filed on December 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. 1. The fifth amendment to the United States Constitution, including the double jeopardy clause, provides:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The seventh amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rule of the common law.

B. "Chapter 44 - Firearms" of title 18, United States Code, provides in pertinent part:

1. 18 U.S.C. §922. Unlawful acts. (a) It shall be unlawful -
   (1) For any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing or dealing in firearms or ammunition, or in the course of such business to ship, transport or receive any firearm or ammunition in interstate or foreign commerce;

2. 18 U.S.C. §924. Penalties.
   (a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

   (b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

   (c) Whoever -
      (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

      (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

(d) Any firearm or ammunition involved in or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

(Added Pub.L. 90-351, Title IV, §902, June 19, 1986, 82 Stat. 233, and amended Pub. L. 90-618, Title I, §102, Oct 22, 1968, 82 Stat. 1223; Pub. L. 91-664, Title II, §13, Jan. 2, 1971, 84 Stat. 1889.)

STATEMENT

1. *The Earlier Criminal Proceeding.*

Patrick M. Mulcahey was indicted by the Grand Jury in the

United States District Court of South Carolina, Columbia Division, for an alleged violation of the provisions of chapter 44, 18 U.S.C. §§922(a)(1) and 924(a). *United States v. Mulcahey*, No. 77-00013 (D. S. Car.). The one count indictment alleged that Mulchey was engaged in the business of dealing in firearms without being licensed to do so under the provisions of "Chapter 44 - Firearms" of Title 18, United States Code. On March 16, 1977 after a full trial the jury found Mulcahey not guilty of the alleged violation. The district court accordingly entered a judgment of acquittal and dismissed the indictment.

2. *The Present Forfeiture Proceeding.*

On March 31, 1977, or approximately 2 weeks after the jury had found that Mulcahey had not violated the firearms laws, the United States commenced this second action in the United States District Court for the District of South Carolina, this time seeking forfeiture to the United States of the same firearms on which the Government's unsuccessful criminal prosecution against Mulcahey had been based. The Government complaint in the forfeiture action alleged that Mulcahey, while engaged in dealing in firearms without a license violated 18 U.S.C. §922(a)(1) of Chapter 44. The Government claimed that: "such firearms were had and possessed and used and intended to be used -- by Patrick M. Mulcahey in Richland County, South Carolina, in violation of the laws of the United States by engaging in the business of a dealer in firearms and ammunition without the said Patrick M. Mulcahey having first applied for and received a license as a dealer in firearms --." Forfeiture of the firearms was sought under 18 U.S.C. §924(d), one of the "Penalties" provisions of chapter 44, 18 U.S.C. §924.

Mulcahey filed a claim for recovery of the firearms which had, in the meanwhile, been seized from him by the Government. Mulcahey also answered the forfeiture complaint, asserting several defenses, including the doctrines of collateral

estoppel and res judicata as a bar to the claimed forfeiture.[1]

The district court, reexamining the jury's finding of "no violation," rejected that finding and substituted its own finding to the effect that Mulcahey dealt in firearms without a license and had thus violated 18 U.S.C. §922(a)(1). The district court then rejected Mulcahey's collateral estoppel and res judicata defenses and ruled that the firearms were subject to forfeiture under 18 U.S.C. §924(d).

The Court of Appeals for the Fourth Circuit reversed, holding that the forfeiture action was barred by Mulcahey's criminal acquittal. The court noted that "the same firearms that were introduced into evidence in the criminal action are the subject of the forfeiture action." Pet. App. B. 21a. The court further noted that "(t)o support a conviction under 18 U.S.C. §922(a)", as well as in a forfeiture action, the "Government must prove" the "same two essential elements": first, that the defendent engaged in the business of dealing in firearms and, second, that at that time he engaged in that business he was not a licensed dealer in firearms. Pet. App. B. 20a-21a. Noting that the "United States had its day in court on these identical issues

[1] Our brief in opposition relies only on those defenses which were reached and considered by the court below. By so limiting our brief in opposition, we do not intend thereby to abandon or waive any other defenses or any of our other challenges to the district court judgment not required to be considered by the court below in view of its disposition of the case. In brief, those additional defenses and challenges were *inter alia*:

(1) The Court erred in finding that Mulcahey engaged in the business of dealing in firearms, and

(2) The Court erred in finding that the firearms seized were the same as those alleged to have been used in the firearms business.

If certiorari should be granted by this Court, or in the event of any other further proceedings, we intend to rely on and reassert those additional defenses and challenges.

in the criminal proceeding" the court of appeals ruled that under the doctrine of collateral estoppel the Government is precluded by the verdict of acquittal in the criminal proceeding from relitigating the identical matter in the forfeiture action. (Pet. App. B. 21a).

As an indepdent ground for reversing the district court, the court of appeals also emphasized that 18 U.S.C. §924(d) subjects firearms to forfeiture, only upon a showing of "violation of any of the provisions of this chapter (i.e., Chapter 44 - Firearms of Title 18, United States Code) . . . or any violation of any other criminal law of the United States." 18 U.S.C. §924(d). The United States had failed to meet this statutory requirement, the court of appeals ruled, because "the criminal verdict conclusively decided that the firearms in question were not 'involved in or used or intended to be used in the violations of any provisions of this Chapter (i.e., Chapter 44 - Firearms)'." Pet. App. B. 21a and 8a. Judge Winter dissented.

On rehearing, the court of appeals *en banc*, by a 5-4 vote, again reversed the district court's order of forfeiture. Pet. App. A. 1a-14a. The *en banc* court flatly rejected the Government's argument that a prior acquittal does not bar subsequent forfeiture proceedings. In addition to the grounds relied on by the panel opinion, the *en banc* court pointed out that "the present forfeiture is criminal in nature and the prior jury verdict is a bar to the present proceeding." Pet. App. A. 9a. In that connection, the court took special note of the fact that:

> "the forfeiture provision set forth in §924(d) is a part of the 'Penalties' section of the law. Everything in §924 provides a penalty, be it fine, prison or forfeiture, for the violation of a provision of the Gun Control Act. The forfeiture provision is merely a way of disposing of firearms which have been used in violation of the Act *after there is a conviction of such violation.* Forfeiture is

a penalty suffered by a defendant in addition to a fine and/or imprisonment. If Mulcahey had been convicted, he could have been fined and/or imprisoned and would have lost all of his firearms under §924(d). But he was acquitted on the charge of being a gun dealer without a license. However, the Government still wishes to invoke the penalty of §924(d). Mulcahey would thereby be subject to the same penalty of losing his property for an activity for which he had been found not guilty." Pet. App. A. 9a-10a. (Emphasis supplied.)

REASONS FOR DENYING THE WRIT

Certiorari should be denied because:

A. This case presents no issue of far-reaching, recurrent importance. To the contrary, the decision below is the natural result of the particularized facts of this case involving a unique situation unlikely to recur.

B. The holding below is manifestly correct as to each of the three independent grounds on which it is based. Moreover, the correctness of that holding finds further strong support in the dual purposes underlying the doctrines of collateral estoppel and *res judicata*, i.e., to protect litigants from the harassment and burdens of relitigating the same cause of action with the same parties or thier privies and to promote judicial economy by preventing needless re-litigation. *Parklane Hosiery, Inc. v. Shore*, 439 U.S. 322, 326 (1979); *Montana v. United States*, 440 U.S. 147, 153-54 (1979). These purposes, we note, are not considered or even addressed by the United States, despite the primary role normally claimed by the Government as champion of fair, efficient and prompt administration of justice in the federal court system.

C. Finally, as the opinion of the court below abundantly demonstrates, there is no conflict with any decision of this Court or any other court of appeals.

Further review by this Court, therefore, is not warranted.

A. *Lack of "certiorari" importance.* The issue raised by the Government is plainly not of sufficient importance to warrant review here. The present case does not involve the recurring or "fairly novel legal" question as to whether a criminal *conviction* may be given collateral estoppel effect in subsequent *private* civil suits arising out of the same events that had triggered the conviction. *Travelers Indemnity Co. v. Walburn,* 378 F. Supp. 860, 862 (D., D. of Col.) (1974);[2] *Eagle Star & British Dominions Insurance Co. v. Heller,* 149 Va. 82, 140 S.E. 314 (1927); *Hurtt v. Stirone,* 416 Pa. 493, 498, 206 A.2d 624, 626, *cert. denied,* 381 U.S. 925 (1965) (where the Pennsylvania Supreme Court emphasized that the failure to give collateral estoppel effect to a prior jury determination of guilt would "fly in the face of reason (and be a) general indictment of the whole American jury system."

The present case, as already noted, does not involve this kind of recurring question. To the contrary, the present case turns on an entirely unique and specialized set of facts in which

(1) the criminal prosecution filed by the United States against Mulcahey resulted in an acquittal, not a conviction;

(2) despite the acquittal, the United States, rather than a

[2] In *Travelers,* the court reasoned that when a person has received a full and fair opportunity to litigate, "it is only sensible that if an issue is necessarily decided in the criminal case it should be accepted as conclusive proof in a subsequent civil proceeding where that issue is dispositive." 378 F. Supp. 862, 868.

private litigant who had not participated in the criminal proceeding, has filed the second proceeding (for forfeiture) seeking to relitigate the identical issues on which its own abortive criminal prosecution had been based;

(3) the initial criminal prosecution obviously afforded the United States a full and fair opportunity to litigate the basic issue dispositive of both the criminal prosecution and the later forfeiture proceeding, i.e., did Mulcahey violate the federal criminal law as to dealing in firearms;

(4) the jury verdict in the criminal proceeding conclusively determined that Mulcahey had committed no such violation; and

(5) the forfeiture statute itself denies the United States forfeiture in the absence of a showing of such a violation.

We show below that these special facts and circumstances confirm the correctness of the decision below. At the same time, the highly unique character of these special facts buttresses the view that the issue raised by petitioner United States is unlikely to recur and hence lacks sufficient importance to be an appropriate candidate for a grant of certiorari.

B. *The decision challenged here is plainly correct.*

1. The decision below, in barring the forfeiture action, properly relies on the Government's failure to meet the essential precondition for invoking the forfeiture statute. 18 U.S.C. §924(d) prescribes a built-in and express requirement for seeking forfeiture, that is, the Government must establish that the firearms involved were used in "violation of the provisions of (Chapter 44 - Firearms, Title 18, United States Code) . . . or a violation of any other criminal law of the United States." The Government obviously failed here to make any such showing of the necessary "violation." To the contrary, the

jury acquittal constitutes a direct holding that there was no violation of the criminal laws. In sum, the Government improperly sought forfeiture because it is only when the forfeiture is claimed to arise out of the commission of a criminal offense that §924(d) is triggered into operation. See *1 Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 236 at n.6 (1972). Here, however, the jury's acquittal of Mulcahey unequivocally established that there was no violation of the federal criminal law.[3] As emphasized in both the panel and *en banc* opinions (Pet. App. A. 8a and Pet. App. B. 21a), "the criminal verdict conclusively determined that the firearms were not involved in or used or intended to be used in the violation" of federal criminal law. In short, the verdict of acquittal necessarily refutes the notion that the forfeiture action is based on a violation of federal criminal law.

2. The correctness of the decision below is independently corroborated by the doctrine of collateral estoppel. This Court has frequently reiterated the need for applying this doctrine in order to minimize the harassment and heavy burdens imposed by relitigation on both defendents as well as on the court system. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 and *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322.[4] Furthermore, in *Allen*

[3] The seventh amendment (*supra*, p. 2) immunizes this jury finding against "re-examination in any court of the United States."

[4] *Blonder-Tongue* involved the defensive use of the estoppel plea. The *Parklane Hosiery* case presented the question as to whether a second or a different plaintiff could use estoppel offensively, i.e., as a sword rather than a shield. The precise issue before this Court in *Parklane* was whether a party who has had issues of fact adjudicated adversely to it in an equitable

(Footnote continued on following page.)

(Continuation of previous footnote.)

action may be collaterally estopped from relitigating the same issues before a jury in a subsequent action for money damages brought against it by a new party. In the *Parklane* case, the first action involved a suit by the SEC against Parklane Hosiery, alleging that Parklane Hosiery had issued a materially false and misleading proxy statement in connection with a merger. The SEC complaint sought injunctive relief. The district court in that suit agreed with the SEC and ruled that the proxy statement of Parklane had been materially false and misleading. The Court of Appeals for the 2nd Circuit affirmed that judgment. In the second Parklane case, i.e., the one reaching this Court, the plaintiffs were stockholders who claimed money damages as a result of Parklane's allegedly false and misleading proxy statement. This Court, in *Parklane*, in allowing the new plaintiffs to take advantage of the earlier ruling obtained by the SEC in its injunctive suit, authorized the offensive use of collateral estoppel.

In both cases, this Court's principal concern was whether the party, against whom estoppel was being sought, had had a full and fair opportunity to litigate the issue in the earlier case. As cogently noted in this Court's opinion in *Blonder-Tongue*, "the broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." 402 U.S. 313. Indeed, over thirty years ago, Judge Hastie, foreshadowing this sensible development in the law, declared that "a party who has had one fair and full opportunity" to litigate and "has failed in that effort", should not be permitted to go to trial on the merits of that claim for a second time. Both orderliness and reasonable time-saving in judicial administration require that this be so unless some overriding consideration of fairness to a litigant dictates a different result". *Bruszewski v. United States*, 181 F.2d 419, 421 (CA-3 1950) *cert. denied*, 340 U.S. 865. *Accord: Adriaanse v. United States*, 184 F.2d 968 (CA-2 1950) *cert. denied*, 340 U.S. 932.

In the present case, there can be no doubt that there was a full and fair, indeed abundant, opportunity afforded to the United States, in its criminal case, to litigate the question of violation of the federal criminal laws with respect to firearms. As expressly noted in the panel opinion below, "the United States had its day in court on these identical issues in the criminal proceeding." (Pet. App. B. 21a).

v. McCurry, 449, U.S. 90, 105 (1980), this Court approved giving collateral estoppel effect, in a federal court, to an earlier state court criminal determination. *A fortiori*, the same approval is called for here as to the ruling below according collateral estoppel effect, in the forfeiture proceeding in the federal court, to the earlier determination in the criminal proceeding in the same *federal* court.

The foregoing considerations are completely overlooked by the Government, despite the fact that this Court has long recognized that "public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Travelling Mens Association*, 283 U.S. 522, 525 (1931). The doctrine of collateral estoppel and the associated "doctrine of *res judicata* (are) not a mere matter of practice and procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the Court." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917). As emphasized less than two years ago in *Federated Department Stores, Inc. v. Moitie & Brown*, 452 U.S. 394, 401 (1981),

> "The language used by this Court half a century ago is even more compelling in view of today's crowded dockets."

3. There is still a third ground, separately establishing the correctness of the result reached below. Almost 100 years ago this Court held that "proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Boyd v. United States*, 116 U.S. 616 (1886). It follows that once a person is tried criminally for a

violation of a statute, that same violation cannot, because of the double jeopardy clause of the Fifth Amendment, form the basis for a subsequent forfeiture action, whether the criminal proceeding results in conviction or, as here, in acquittal. As the *en banc* opinion properly ruled "The present forfeiture is criminal in nature and the prior jury verdict is a bar to the present proceeding." (Pet. App. A. 9a).

C. *There is no conflict of decisions.*

The conflicts in decisions, asserted by the Government, are illusory. The cases principally relied on by the Government have already been carefully analyzed and properly distinquished in the opinion below. See Pet. App. A. 6a, 8a, 9a, 10a and 11a. There is no conflict calling for resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief for the Respondent in Opposition was served upon counsel for the petitioner, The Honorable Rex E. Lee, Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530 and on Mary G. Slocum, Assistant United States Attorney, Post Office Box 2266, Columbia, South Carolina 29202, by first class mail with proper postage affixed this 31st day of January, 1983.

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